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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. TEDDY RAY LOUVIERE, Defendant and Appellant.	2d Crim. No. B172312 (Super. Ct. No. TA069803) (Los Angeles County)

Appellant Teddy Ray Louviere was tried before a jury and convicted of transporting methamphetamine and being under the influence of methamphetamine. (Health & Saf. Code, §§ 11379, subd. (a), 11550, subd. (a).)[1] He contends the judgment must be reversed because the trial court improperly limited his attorney's redirect examination. He also claims he was entitled to probation under the provisions of Proposition 36, and that the factual basis for denying probation should have been determined by the jury rather than the trial court. We affirm.

BACKGROUND

Deputy Marc Boscovich of the Los Angeles County Sheriff's Department was on patrol near Figueroa and Sepulveda in the City of Carson shortly after midnight on October 30, 2002. Appellant was driving a Nissan truck and had stopped for a red light

[1] All statutory references are to the Health and Safety Code unless otherwise stated.

inside the crosswalk of that intersection. Noting the truck's position, its dark tinted windows, and its lack of a front license plate, Boscovich made a traffic stop.

Appellant was sweating profusely, his hands were shaking, and his pupils were constricted. After determining that appellant was the registered owner of the truck and that it had not been reported stolen, Boscovich had appellant step outside. Noticing a bulge in appellant's sweatshirt, Boscovich conducted a patdown search and discovered a roll of fifty $1 bills and an additional $415 in cash in appellant's pockets. Appellant said that he used the $1 bills when he played darts and that he had recently cashed a disability check. He also mentioned that he was coming from playing darts at a friend's house.

Boscovich checked appellant's pulse and performed a "light accommodation" test to measure the dilation of appellants' pupils. He suspected that appellant was under the influence of methamphetamine and asked him when he had last used the drug. Appellant said he had stopped using, but when he was told that he could give a urine sample, responded, "What's the point[?] It's just going to come back dirty. I used." Boscovich searched the truck incident to appellant's arrest and found a glass smoking pipe next to appellant's wallet. Behind the seat was a nylon bag containing 11.7 grams of methamphetamine, an amount that would yield about 600 doses and had a street value of about $800. Under the seat was a loaded .25-caliber handgun.

Boscovich confronted appellant about the methamphetamine and said there was enough to charge him with sales. Appellant responded, "There's only about 12 grams. That's not sales. I'm an addict. I'm not a seller. I need a program." Appellant denied that the gun was his; he said that he had given a friend a ride and the friend must have left it under the seat. Asked if his fingerprints would be on the gun, appellant said they probably would be because he had been handling it at his friend's house.[2] Appellant never mentioned that he had recently loaned the truck to a friend.

Appellant was charged with felon in possession of a firearm (Pen. Code, § 12021, subd. (a)), possession of methamphetamine for sale (§ 11378), transportation of methamphetamine (§ 11379) and being under the influence of a controlled substance

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[2] No fingerprints were recovered from the gun.

(§ 11550, subd. (a)).[3] At trial, he testified that a few days before his arrest, he had loaned his truck to a friend named Jack Mosquad. Mosquad lived in Temecula and had known appellant for 26 years. He did not return the truck when he was supposed to, but appellant did not call the police due to their long friendship. Instead, appellant called some of his friends and told them to keep their eyes out for the truck.

Appellant claimed that he received a call from his friend Michael Fisher on the night of his arrest telling him that his truck was parked in Carson down the street from Fisher's home. Steven Escovedo gave him a ride to pick up the truck. Appellant noticed when he got inside the truck that there were several items he did not recognize. He was stopped soon after by Deputy Boscovich and arrested for driving with a suspended license. Appellant denied knowing anything about the drugs and gun found in the truck and denied that he acknowledged ownership of the drugs during his conversation with Boscovich. He did not tell Boscovich that he had just recovered the truck because Boscovich "didn't want to hear that." Fisher and Escovedo both testified on behalf of the defense, essentially confirming that Fisher had called appellant with news about the truck and that Escovedo had driven appellant to pick it up.

The court granted appellant's unopposed motion to acquit on the possession for sale count. (Pen. Code, § 1118.1.) The jury found him guilty of transportation and being under the influence, but was unable to reach a verdict as to the felon in possession count. Appellant admitted a prior drug conviction under section 11370.2, subdivision (b).

The case was referred to the probation department for an evaluation of appellant's eligibility for drug treatment under Proposition 36 as an alternative to prison. The report concluded that one of appellant's convictions was non-qualifying. The court denied appellant's request for probation and sentenced him to prison for six years, consisting of the three-year middle term on the transportation count and a three-year enhancement for his prior drug conviction.

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[3] The prosecution dismissed an additional count of driving with a suspended license before the case was called for trial.

DISCUSSION

Exclusion of "Fight" Evidence

Appellant argues that the judgment must be reversed because the trial court erroneously excluded evidence about a fight he had with Jack Mosquad about a month after his arrest. We disagree.

The defense at trial was that the drugs and gun found in appellant's truck belonged to Mosquad. Appellant testified during cross-examination that he fought with Mosquad after his arrest. On redirect, appellant explained that the fight took place when Mosquad came to his house uninvited about a month later. Defense counsel then asked appellant what had led Mosquad to come to his house, and the prosecutor objected on relevancy and hearsay grounds. Defense counsel made an offer of proof that appellant would testify that Mosquad fought him because Mosquad had heard on the street that appellant was arrested and was going to give Mosquad up as the owner of the drugs and gun. The trial court sustained the prosecutor's objection, ruling that the reason for a confrontation between the two men a month after the fact was irrelevant.

Appellant argues that the exclusion of his proposed testimony violated his right to present a defense under the Sixth and Fourteenth Amendments. Ordinarily, however, the rules of evidence do not infringe upon a defendant's federal constitutional rights. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) "Although completely excluding evidence of an accused's defense could theoretically rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*Id*. at p. 1103.) Appellant was not prevented from presenting his defense that the drugs belonged to Mosquad. The proposed testimony about Mosquad's reason for fighting appellant a month later was at most a "subsidiary point" in the case.

Nor was the ruling an error under state law, which requires that we review the exclusion of the evidence on relevancy grounds for abuse of discretion. (See *People v. Hart* (1999) 20 Cal.4th 546, 606.) According to the offer of proof, appellant's testimony would show that Mosquad was angry because he had heard appellant was going to give his name to police. But it would be logical to expect Mosquad to be angry about his possible

involvement in the case whether or not he was actually the owner of the contraband. The evidence was not probative of whether appellant was guilty or innocent of the charged offenses.

Even if we assume the court should have allowed some brief questioning on this subject, the error was not prejudicial. Appellant's version of events required the jury to believe that Mosquad, a friend of appellant's for 26 years, abandoned appellant's truck, along with a loaded firearm and $800 of methamphetamine, without any explanation to appellant, in an area that was far from his own home but just happened to be down the street from the home of another of appellant's friends. The jury would also have to believe that the officer who arrested appellant lied about virtually everything appellant said during their encounter, yet did not go so far in that lie to claim that appellant had either admitted ownership of the gun or admitted that he was a drug dealer. If the jurors did accept this improbable version of events, the testimony about Mosquad's reason for wanting to fight appellant would be superfluous. If, however, they did not believe that Mosquad had borrowed the truck, appellant's own self-serving testimony to the effect that Mosquad was worried appellant would turn him in would add no weight to appellant's story. It is not reasonably probable that the excluded evidence would have made the jury more likely to return a verdict more favorable to appellant. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Proposition 36

Appellant contends that his prison sentence must be vacated because he was entitled to a grant of probation under Proposition 36 (Substance Abuse and Crime Prevention Act of 2000). We reject the claim.

Proposition 36 changed the penal consequences for defendants convicted of "nonviolent drug possession offense[s]" by requiring that such offenders be placed on probation with mandatory drug treatment rather than being sentenced to prison. Penal Code section 1210, subdivision (a) defines a "nonviolent drug possession offense" as "the unlawful personal use, possession for personal use, or transportation for personal use of any controlled substance . . . or the offense of being under the influence of a controlled

substance . . . . The term 'nonviolent drug possession offense' does not include the possession for sale, production, or manufacturing of any controlled substance . . . ." (Citations omitted.) Section 1210.1, subdivision (b)(2) provides that Proposition 36 does not apply to "[a]ny defendant who, in addition to one or more nonviolent drug possession offenses, has been convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony."

There is no dispute that appellant's misdemeanor conviction of being under the influence of a controlled substance was a nonviolent drug possession offense under Proposition 36. But his conviction of transporting a controlled substance could only qualify as a Proposition 36 offense if the transported substance was for personal use. As the party claiming an entitlement to probation and drug treatment under Proposition 36, appellant bore the burden of proving by a preponderance of the evidence that the drugs in his car were for personal use. (Evid. Code, § 115; *People v. Barasa* (2002) 103 Cal.App.4th 287, 295-296.)

Appellant complains that the court never made a factual determination about his Proposition 36 eligibility, but the record belies this claim. After the jury returned its verdicts, the probation department prepared a report indicating that Proposition 36 did not apply because one of appellant's offenses did not qualify. Under the circumstances, it can only have been the transportation offense to which the court was referring. The trial court held a hearing at which it stated, "We did everything we thought that we could do to get you into the program, but it turns out that you are not eligible." At the subsequent sentencing hearing, the court imposed a prison sentence, implicitly and necessarily concluding that appellant was not entitled to treatment under Proposition 36. From this record, we can readily imply the necessary finding that appellant was not transporting drugs solely for personal use. (See *People v. Dove* (2004) 124 Cal.App.4th 1.)

We also reject appellant's argument that the court's finding on the personal use issue was unsupported by the evidence or contrary to its ruling granting the defense motion for acquittal on the possession for sale count. The evidence showed that appellant transported $800 of methamphetamine, enough for 600 doses, and the court could

rationally infer that these drugs were not intended solely for personal use. Although the court had earlier dismissed the charge of possession for sale, it apparently did so because the prosecution failed to oppose the motion for acquittal made by the defense. In any event, a determination that the *prosecution* had not proved the charge of possession for sale beyond a reasonable doubt does not preclude a finding that the *defendant* failed to establish the converse by a preponderance of the evidence. (See *People v. Dove*, *supra*, 124 Cal.App.4th at p. 11; *People v. Glasper* (2003) 113 Cal.App.4th 1104, 1114-1115 [findings that drugs transported were not for personal use under Proposition 36 were upheld on appeal despite acquittals on related possession for sale charges].)

Appellant argues that the jury, not the trial court, should have determined whether the drugs were transported for sale. He relies on *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington* (2004) __ U.S. __ [159 L.Ed.2d 403], which collectively held that the court cannot impose a sentence in excess of the statutory maximum penalty based on facts that are neither admitted by the defendant nor presented to the jury and found true beyond a reasonable doubt. Proposition 36 effects a sentence *reduction* rather than an increase beyond the statutory maximum. Neither *Apprendi* nor *Blakely* applies. (*In re Varnell* (2003) 30 Cal.4th 1132, 1142; *People v. Dove*, *supra*, 124 Cal.App.4th at pp. 10-11; *People v. Glasper*, *supra*, 113 Cal.App.4th at p. 1115; *People v. Barasa*, *supra*, 103 Cal.App.4th at pp. 294-295.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Allen J. Webster, Jr., Judge

Superior Court County of Los Angeles

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan, Supervising Deputy Attorney General, Lawrence M. Daniels, Deputy Attorney General, for Plaintiff and Respondent.